

OCTOBER 2023 NASTTPO CONFERENCE

REGULATORY/LEGISLATIVE/LITIGATION UPDATE

Timothy R Gablehouse

Member, Colorado Emergency Planning Comm. (SERC);  
Board Member Colorado Emergency Preparedness Partnership, Inc.  
Past President & Board Member NASTTPO;  
Attorney Gablehouse Granberg, LLC

1

---

---

---

---

---

---

---

---

REGULATORY ACTIONS

- ▶ CWA WORST CASE SPILL PREVENTION REGULATION
  - ▶ At OMB, final rule by the end of the year?
- ▶ CAFO – Final EPCRA exemption rule
  - ▶ Will be revised momentarily?
- ▶ RMP – Final RMP Reconsideration Rule Issued
  - ▶ Extensively revised in proposed: “Safer Communities by Chemical Accident Prevention”
  - ▶ Pending at OMB, final in first quarter?
- ▶ Chemical Safety Board Reporting Rule/Form adopted
  - ▶ Guidance available at esb.gov
- ▶ PHMSA proposals to improve planning for pipelines and rail.

2

---

---

---

---

---

---

---

---

CWA WORST CASE PROPOSAL

▶ APPLICATION

- ▶ onshore nontransportation-related facilities
- ▶ “that could reasonably be expected to cause substantial harm to the environment by discharging CWA hazardous substances”
  - ▶ CWA hazardous substances are a different list
  - ▶ Requires response planning.

3

---

---

---

---

---

---

---

---

### PRESSURE ON EPA TO EXPAND RMP

- ▶ Emphasis on EJ Issues
- ▶ April 14, 2022 Letter from Members of Congress
- ▶ “Common sense emergency response measures, such as back-up power, leak detection, and real-time air monitoring, along with broad and accessible information access – such as multilingual outreach before an incident occurs – should be included.”

4

---

---

---

---

---

---

---

---

### AND THAT’S WHAT EPA DID

- ▶ “Safer Communities by Chemical Accident Prevention”
  - ▶ Information upon request to anyone within 6-miles in the language preferred by the requestor.
  - ▶ Requires safer technologies
  - ▶ Greater employee participation & third-party audits
  - ▶ Risks of natural hazards, climate change, loss of power.
  - ▶ Coordination and exercises
  - ▶ Facility siting and zoning addressed in hazard reviews.

5

---

---

---

---

---

---

---

---

### EPA Retail Fertilizer Exemption Guidance

- ▶ EPCRA section 311(e)(5) exempts retailers from reporting when held for sale to the ultimate customer (farmer who applies the fertilizer).
- ▶ The Exemption does not apply to:
  - ▶ Fertilizers mixed or blended with other things
  - ▶ Other chemicals that are used or stored on site

6

---

---

---

---

---

---

---

---

**THE NEXT BIG THINGS**

- ▶ PFAS
- ▶ Product bans and product substitution risks
  - ▶ Burning ammonia with coal for example
- ▶ Failure to manage change
  - ▶ Maintenance cycles to climate change
- ▶ New information sources – fence line monitoring
- ▶ Civil Rights & Environmental Justice

7

---

---

---

---

---

---

---

---

**CRIMINAL ENFORCEMENT**

- Criminal charges and bigger fines more common
  - Companies and individuals
- Arkema, Flint, PG&E and others – reckless behavior
- Federal charges
  - Midwest Grain Products – criminal negligence under CAA
  - Aghorn Operating Inc. & VP indicted - CAA & OSHA crimes.
  - DuPont and facility manager guilty in chemical release and death of 4 employees. Total fines \$19 MM +, 1 year sentence.

8

---

---

---

---

---

---

---

---

**CIVIL CLAIMS**

- COMPANIES ALWAYS SUED AFTER AN ACCIDENT
  - Negligence, property damage, class actions
- GOVERNMENT EMPLOYEES CAN BE SUED
  - Employees negligently/recklessly responded or provided negligent/reckless reassurances
- CIVIL CLAIMS AGAINST EPA HAVE SUCCEEDED
  - Failed to address imminent hazards
  - Failed to adequately “supervise” State agency’s actions
- CIVIL CLAIMS AGAINST STATE AGENCIES
- GOVERNMENT CAN CLAIM ENVIRONMENTAL HARM
  - Texas sued Shell for an accident in May – firefighting water

9

---

---

---

---

---

---

---

---

CHEMICAL RELEASE FINES

- Georgia poultry facility nitrogen release kills six
  - Total fines of over \$1MM for OSHA violations
  - Deliberate indifference – safety manager position unfilled
  - Criminal charges avoided because immigrant workers afraid to testify
- Taylor Farms fined \$650,000 for RMP/EPCRA violations
- Tesoro pays \$27.5 MM violation of CAA consent decree

---

---

---

---

---

---

---

---

10

CIVIL LIABILITY AGAINST GOVERNMENT  
NEW THEORIES

- FAILURE TO WARN
  - Difficult – hasn't worked in wildland fire cases
    - Suit file last month in Maui over failure to use sirens
  - Requires proof of applicable standards and failure to perform
  - Broad exemptions for discretionary actions
- INVERSE CONDEMNATION CLAIMS
  - Not necessary to prove negligence
  - State environment & health agencies, cities & counties, utilities and other entities with condemnation power
  - These claims now used in the wildland fire cases, including Maui, California and Colorado
  - Often brought along with other civil rights claims

---

---

---

---

---

---

---

---

11

OTHER LITIGATION

- US Steel Release Reporting Under CERCLA
  - Permitted Release Exempt from Reporting Even When Permit Violated
  - Still Consequences
    - Over \$600,000 fines, release notification commitments
- US v. Multistar Industries, (E.D. Wash. August 1, 2023)
  - EPCRA reporting required for railcars used as storage when no motive power is attached and no bills of lading existed.

---

---

---

---

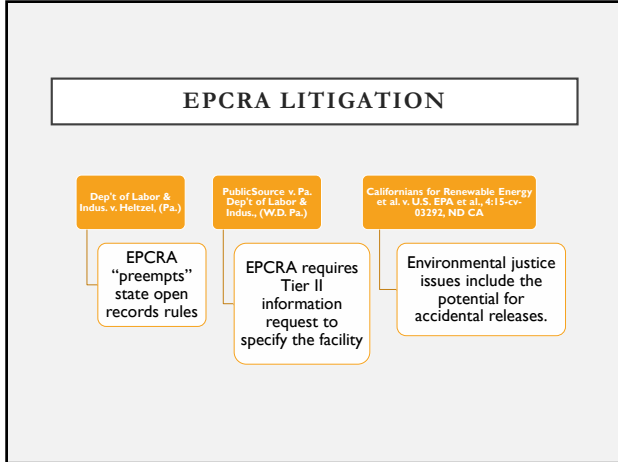
---

---

---

---

12



13

---

---

---

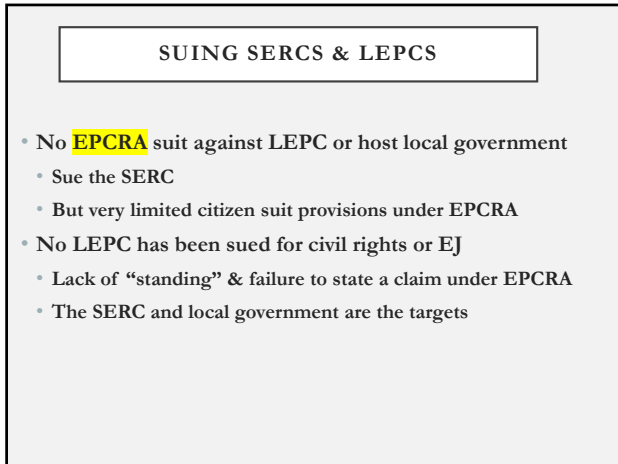
---

---

---

---

---



14

---

---

---

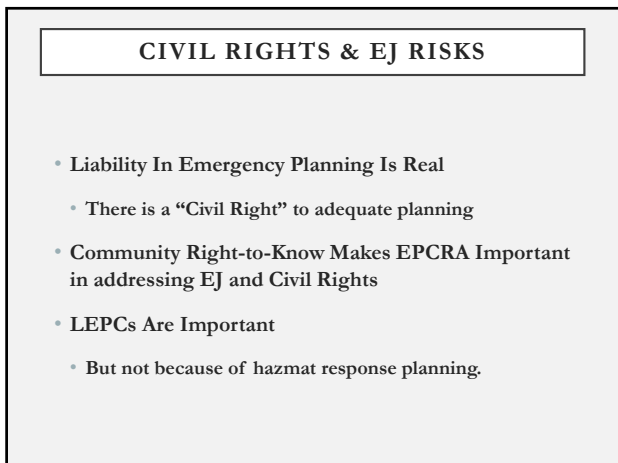
---

---

---

---

---



15

---

---

---

---

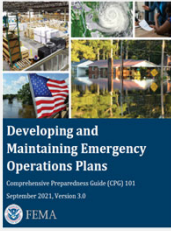
---

---

---

---

**CPG 101 VER. 3.0**



**SPENDS 8 PAGES EXPANDING THE CIVIL RIGHTS MESSAGE:**

“State and local governments must comply with Title II of the Americans with Disabilities Act (ADA) in emergency- and disaster-related programs, ...”<sup>1</sup>

“In addition to the ADA, planners must comply with Title VI of the Civil Rights Act of 1964, Executive Order 13166, Section 504 of the Rehabilitation Act and other federal, state or local laws, to include anti-discrimination laws.”

“In the nation’s system of emergency management, the local government acts first to address the public’s emergency needs. ... **At a minimum, these measures include priorities such as warning, emergency public information, evacuation, shelter, security, emergency medical care and tactical communications.**”

<sup>1</sup>Look at [ada.gov](http://ada.gov) to understand the magnitude of the mandate.

16

---

---

---

---

---

---

---

---

---

---

**THE REALITIES THAT CREATE POTENTIAL LIABILITY**

- Evaluated in 20/20 hindsight
- Focus on response instead of preparedness & planning
- No community sense of responsibility for preparedness
  - Public and small business get a “pass” - creates “victims”
- Regulatory compliance is meaningless
  - Chemical lists and thresholds don’t correlate to risk
- Failing to regulate is not a safe harbor
  - Planning must incorporate all the risks

17

---

---

---

---

---

---

---

---

---

---

**HOW TO GET SUED**

- Fail to be certain evacuation, sheltering, communication and transportation plans work.
- Fail to be certain that people have “access” to services.
  - Availability isn’t enough.
- Fail to involve non-English speaking communities.
- Fail to engage people protected by the ADA in evaluation of services.

18

---

---

---

---

---

---

---

---

---

---

**PATH FORWARD - KEY STEPS**

- ENGAGE – BE PART OF THE COMMUNITY
- TELL PEOPLE WHAT YOU DO & WHY
- EXPLAIN HOW PLANNING AND RESPONSE WORK
- TELL PEOPLE WHAT YOU CANNOT DO
  - *BE HONEST*
  - *CREATE EXPECTATIONS*

19

---

---

---

---

---

---

---

---

.....

Timothy Gablehouse  
tgablehouse@att.net OR tgablehouse@gcgllc.com  
303.572.0050

Let me know if you want to be on the NASTTPO email list or want documents.

20

---

---

---

---

---

---

---

---